

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of Minnikka Properties, LLC

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge M. Kevin Snell on June 12, 2012 at the Kanabec County Courthouse, 18 N. Vine Street, Mora Minnesota, and on June 13-14, 2012 at the Office of Administrative Hearings, 600 North Robert Street, Saint Paul, Minnesota. The record closed upon receipt of all post-hearing submissions of the parties on July 5, 2012.¹

Ann E. Cohen, Assistant Attorney General, St. Paul, Minnesota, appeared on behalf of the Minnesota Pollution Control Agency (MPCA). Ms. Carrie Doom, The Law Firm of Carrie Doom, Ltd., Isanti, Minnesota, appeared on behalf of Minnikka Properties, LLC (Minnikka).

STATEMENT OF ISSUE

Did Minnikka violate Minn. R. 7035.2860, subp. 2, by utilizing waste tire shreds/chips on its property located at Harbor Road and 153rd Avenue, Kanabec County, Minnesota, in quantities that exceed accepted engineering standards?

The Administrative Law Judge concludes that Minnikka did utilize waste tire shreds/chips on its property at Harbor Road and 153rd Avenue, Kanabec County, Minnesota, in quantities that exceed accepted engineering standards in violation of Minn. R. 7035.2860, subp. 2.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

History of First State Tire Disposal, Inc., Monte Niemi, & Minnikka Properties, LLC

1. First State Tire Disposal, Inc. ("FSTD") collects discarded tires from the retail tire community. The tires are sorted and 30% are resold. The remainder of the tires are shredded, stored at the FSTD facility and sold as tire-derived product (TDP) for permitted, recycled use. Mr. Monte Niemi owns FSTD. Mr. Niemi began utilizing TDP

¹ Minn. Stat. § 14.58. Minnesota Statutes are cited to the 2010 Edition.

in 1986 for use in construction. FSTD's facility is currently located in Isanti, Minnesota. The tire shreds are stored in bins on the FSTD site until they are used for a project.²

2. FSTD's mechanical shredders utilize a single-pass operation and generally produce a product between six to eight inches wide and 12 to 18 inches long.³ FSTD's TDP is a "tire shred" and not a "tire chip."⁴

3. Mr. Niemi formed Minnikka on March 31, 2006, as a long-term family planning tool, primarily for the benefit of his disabled adult daughter. He owns 99 percent of Minnikka and is Minnikka's manager.⁵

4. In 2009 Ms. Vikki Fore purchased 15 acres of vacant land north of and adjacent to property that Minnikka would later purchase at the corner of Harbor Road and 153rd Avenue, Kanabec County, Minnesota. Her husband constructed a 10-bed assisted living facility that she operates. It opened in May 2009. Ms. Fore's property contains a long driveway that is utilized by semi-trucks weekly for delivering food. The driveway contains Class 5 aggregate on top and no extra measures were required to be taken because of the soil. The driveway is stable and there have been no problems, such as frost heave, with its use.⁶

5. Minnikka purchased the property at the corner of Harbor Road and 153rd Avenue, Kanabec County, Minnesota (the Harbor Road property), that is adjacent to and south of the Fore property. There were two principal reasons for the purchase of the property. First, was to build a residence on the property where Mr. Niemi and his daughter could live. Second, the proximity to Fore's assisted living center met with Mr. Niemi's long term view of the assisted living facility's availability for his daughter.⁷

6. After Minnikka's purchase of the Harbor Road property, Mr. Niemi purchased a house and a garage elsewhere and transported them to the property. Sometime in 2010, Mr. Niemi began excavating two driveways, 18 feet wide and over 898 feet long combined, from Harbor Road to the buildings under which he placed approximately 200 semi-truck loads of tire shreds that are the subject of this proceeding.⁸

FSTD/Niemi TDP Projects Prior to 2004

7. Mr. Niemi built over 100 projects prior to 2004 using TDP. He built the Minnikka project similar to projects that he had built in the past. He refers to the designs of those projects as "napkin designs" because no engineering plans were used.

² Testimony of Monte Niemi.

³ *Id.*; Test. of Curt Hoffman, Senior Pollution Control Specialist in the MPCA Solid Waste Compliance and Enforcement Unit.

⁴ Ex. 36 at p. 2; Test. of C. Hoffman.

⁵ Test. of M. Niemi; Ex. 14.

⁶ Test. of Vikki Fore; Ex. 16.

⁷ Test. of M. Niemi.

⁸ *Id.*; Test. of C. Hoffman, Vikki Fore, Dennis McNally, and Darrel McIlwain.

Mr. Niemi is not an engineer. He proceeded with the Minnikka Harbor Road project pursuant to his conclusion that, since he had used certain depths of waste tire material in the past on projects, he was free to use the same depth of material in a new project, regardless of the circumstances. Mr. Niemi did so knowing that, because of MPCA's enforcement actions against him in the past, the MPCA did not agree with his interpretation of the beneficial use rules that have been in place since 2004.⁹

MPCA's 2004 Beneficial Use Rules for Solid Waste

8. The MPCA adopted beneficial use rules in 2004 that apply to solid waste. The purpose of the beneficial use rules is to standardize the MPCA's approach to allowing use of waste so as to encourage the beneficial use of solid wastes.¹⁰

9. The portion of the overall beneficial use rule applicable to this case provides:

Beneficial use standards. To constitute a beneficial use under this part, the following standards must be met:

A. the solid waste must not be stored in anticipation of speculative future markets;

B. the solid waste must be adequately characterized in accordance with part 7035.2861;

C. the solid waste must be an effective substitute for an analogous material or a necessary ingredient in a new product;

D. the use of the solid waste does not adversely impact human health or the environment; and

E. the solid waste must not be used in quantities that exceed accepted engineering or commercial standards. Excess use of solid waste is not authorized by this part and is considered disposal. (Emphasis added.)¹¹

10. There are two standing beneficial uses specified in the rules that apply to waste tire-derived products relevant to this case. First, Minn. R. 7035.2860, subp. 4, G, allows the use of "[t]ire shreds when used as lightweight fill in the construction of public roads in accordance with Minnesota Statutes, section 115A.912, subdivision 4." Second, Minn. R. 7035.2860, subp. 4, H, allows the use of "[t]ire chips when used as a substitute for conventional aggregate in construction applications when the ratio of this

⁹ Test. of M. Niemi.

¹⁰ Test. of P. Connell.

¹¹ Conclusion 10.

substitution is no greater than one-to-one by volume. This does not include use of tire chips as general construction fill or clean fill.”¹²

11. Mr. Niemi was involved in the development of the Statement of Need and Reasonableness (SONAR) for the foregoing beneficial use rules.¹³

First State Tire Disposal’s MPCA Enforcement History

12. The MPCA has received complaints from the public about the use of waste tire materials generated by FSTD in the past.¹⁴

13. In 2005, an MPCA Inspector received a complaint about waste tires being dumped in a hole along the Interstate 35 exit ramp at Willow River, Minnesota.¹⁵

14. In response to the Willow River complaint, MPCA Inspector conducted an inspection and observed a large area – 100 by 200-300 feet – where tire shreds were being placed. The tire material included half-tires and whole tires. It was difficult to tell how deep the area was but it appeared anywhere from 8 to 12 feet deep.¹⁶

15. The MPCA Inspector was told by the owner of the property that he had been approached by FSTD employee Steve O’Brien, and that Mr. O’Brien said that tires can be used as aggregate substitute and “we can fill this and level this out for you.”¹⁷

16. The MPCA Inspector believed that this use of the waste tire material was not in compliance with the beneficial use rule because it appeared that the waste tire material was being used as construction fill or clean fill. When these concerns were expressed to property owner, he indicated that Mr. O’Brien had said he would take care of any compliance issues.¹⁸

17. The MPCA Inspector then contacted Mr. O’Brien about her concerns. Mr. O’Brien later provided an engineering plan, prepared after the date of the inspection, which showed the waste tire material incorporated into an engineered “infiltration gallery.”¹⁹

18. The MPCA sent a Letter of Warning to FSTD following this incident. A Letter of Warning does not impose a penalty but puts the recipient on notice with regard to what did not comply with applicable rules or statutes.²⁰

¹² Conclusion 13.

¹³ Test. of M. Niemi.

¹⁴ Exs. 2-9.

¹⁵ Test. of Heidi Kroening, MPCA Supvr. for Compliance and Enforcement for Solid Waste.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*; Ex. 2.

19. In the Willow River case, the MPCA allowed the TDP to remain on the site if the plan was followed, including removal of whole tires and half-tires, installation of catch basins, and installation of a fabric cover over the waste tire areas.²¹

20. The Willow River Letter of Warning specifically addressed noncompliance with Minn. R. 7035.2860, subp. 4, H: the use of waste tire chips as a one-to-one substitution for conventional aggregate. The letter specifically identified the need for engineering plans to be developed to ensure that the tire shreds are not being used as general fill.²²

21. In 2007, the MPCA Inspector became aware that MPCA had received another complaint regarding the inappropriate use of waste tire material at Pine Auto Salvage, Pine City, Minnesota. Although the former MPCA Inspector was now the supervisor of the solid waste compliance unit, she conducted an inspection of the site. In March 2007, the MPCA Supervisor observed TDP used in a manner that looked similar to the Willow River site, except that the area where the TDP had been placed appeared to be a wetland. The Pine Auto site was a much larger site. The TDP had been used for general fill to build up an area so that the owner could have a larger area for equipment and inventory.²³

22. In the Pine Auto Salvage case, the MPCA required the owner and FSTD to remove the waste tire material from the site because the material was in the wetland and because the material had been used for general fill. The MPCA entered into a stipulation agreement with FSTD, for violation of the beneficial use rules and for illegal disposal. MPCA required FSTD to sign an agreement and pay a \$5,000 penalty.²⁴

23. The stipulation agreement required FSTD to notify its customers of requirements applicable to the use of tire-derived material. The MPCA included this requirement because the MPCA had learned that people who take FSTD's TDP rely on FSTD with regard to whether and how the product can be used.²⁵

24. FSTD did not fully comply with the 2007 stipulation agreement because it did not remove all the tire shreds from the site by the deadline provided in the agreement. As a result, the MPCA entered into an amendment to the agreement with FSTD in March 2009.²⁶ Under this amendment, MPCA allowed some waste tire shreds to be used on the site out of the sensitive area. At the time, Mr. Niemi complained that the economy was not allowing FSTD to find any projects where he could use waste tire shreds accumulating at his processing facility and from this site. The MPCA required FSTD to pay an additional \$5,000 penalty, but waived other penalties that had accumulated.²⁷

²¹ *Id.*

²² *Id.*

²³ Test. of H. Kroenig.

²⁴ Ex. 3.

²⁵ Test. of H. Kroenig.

²⁶ Ex. 4.

²⁷ Test. of H. Kroenig.

First State Tire Disposal Permitted Facility History

25. The MPCA has issued waste tire processing facility permits to the FSTD's Isanti facilities. The FSTD facility permit was last reissued in 2008. This was the first permit issued for the Isanti location.²⁸

26. At the time the FSTD facility was permitted, there was a compliance issue related to the number of waste tire shreds on the site. The bins storing the shreds were too large to comply with the applicable fire code. As a result, the MPCA included a schedule of compliance to allow FSTD a year to meet the new storage limits.²⁹

27. The permit also included a component to address beneficial use. The permit required FSTD to ensure that, for projects using less than 5,000 cubic yards of material, its customers were aware of the uses for which waste tire shreds could be used under the beneficial use rules by providing those customers a notice concerning the standards for standing beneficial uses for tire-derived materials under the beneficial use rules. For projects involving delivery of more than 5,000 cubic yards of material, FSTD was prohibited from delivering material unless it had "reasonable assurance" that the material would be used as provided under the beneficial use rules, and not as general construction fill or clean fill. The permit specified that "reasonable assurances" means that FSTD had been provided with a copy of a

plan for that project developed by a licensed professional engineer or engineer employed by a governmental unit that incorporates the tire-derived material in accordance with MnDOT standards or as a substitute for conventional aggregate in a ratio no greater than one-to-one by volume³⁰

28. In June 2009, the MPCA Inspector inspected the FSTD facility and determined that it had not met the schedule of compliance to reduce waste tire shred storage. The MPCA Inspector noted this noncompliance in a letter to FSTD.³¹

29. In August 2010, the MPCA Inspector again inspected the FSTD facility and determined that it had not met the schedule of compliance to reduce waste tire shred storage. Again, he noted this noncompliance in two letters to FSTD.³² In October 2011, a similar letter was issued.³³

30. Eventually, the MPCA issued an Administrative Penalty Order to FSTD to get it to reduce the volume of waste tire shreds stored on its processing facility site.³⁴

²⁸ Ex. 5; Test. of C. Hoffman.

²⁹ *Id.*

³⁰ Ex. 5 at 10.

³¹ Ex. 6; Test. of C. Hoffman.

³² Exs. 7A and 7B.

³³ Ex. 8.

³⁴ Ex. 9.

After it received this Order, FSTD proposed to expand its waste tire shred storage. The MPCA has cooperated with FSTD's efforts to achieve compliance with the Administrative Penalty Orders.³⁵

Minnikka's Harbor Road Project

31. An MPCA Staff Engineer received a complaint about tire disposal in Brunswick Township in the summer of 2010. The complaint was that large numbers of tires were being buried on property near the intersection of County Road 12 (Harbor Road) and 153rd Avenue. The complaint was forwarded to MPCA Inspector Curt Hoffman because it was in his region.³⁶

32. In response to the complaint, the MPCA Inspector contacted the complainant. From the description, the MPCA Inspector thought it might be a valid road project.³⁷

33. Because he was familiar with FSTD, the MPCA Inspector called Monte Niemi. Mr. Niemi indicated that he was involved with the project and Inspector Hoffman agreed to meet Mr. Niemi to inspect the project on July 29, 2010, at 7:00 a.m. Inspector Hoffman asked Mr. Niemi to bring FSTD's plans. Inspector Hoffman assumed there would be plans as the result of the FSTD permit condition that required FSTD to make sure that its customer, Minnikka, had a plan so that the material would be used consistent with the beneficial use rules.³⁸

34. When Inspector Hoffman arrived at the site, he observed two roads leading onto the property and a third "spur" driveway. The roads were completed except that black dirt was being put on the side slopes, and aggregate for a driving surface had not yet been placed. Inspector Hoffman could not observe the waste tire material because the material was already covered up. Inspector Hoffman took some pictures of the site.³⁹

35. During the inspection, Mr. Niemi provided Inspector Hoffman with a plan for the roads on the site. Inspector Hoffman looked at the plan and observed that it appeared to be a lightweight fill road plan prepared by an engineer.⁴⁰ Inspector Hoffman believed Niemi had followed the plan.⁴¹ Inspector Hoffman told Mr. Niemi that a lot of controversy could have been avoided if he had provided the plan to local officials. Mr. Niemi indicated that he had obtained local approvals.⁴²

³⁵ Exs. 10, 11.

³⁶ Test. of C. Hoffman and Lisa Mojsiej, MPCA Solid Waste Permit Engineer.

³⁷ Test. of C. Hoffman.

³⁸ *Id.*; Test. of M. Niemi.

³⁹ Ex. 17; Test. of C. Hoffman.

⁴⁰ *Id.*; Ex. 18.

⁴¹ See, Ex. 51 @ 3.

⁴² Test. of C. Hoffman.

36. Inspector Hoffman did not notice the date that the plan had been signed when he received the plan. When he returned to the office, he provided the plan to MPCA Staff Engineer Daniel Vleck for his review.⁴³

37. When Inspector Hoffman next returned to the office, Engineer Vleck brought the date of signature of the plan to Inspector Hoffman's attention. The plan had been signed on July 28, 2010, the day before Inspector Hoffman's inspection. This was a "red flag" for Inspector Hoffman about the project because the plan was required to have been done before the project commenced - so that it could be followed according to its specifications.⁴⁴

38. Inspector Hoffman then called Richard Larson, the engineer who prepared the plan. Mr. Larson admitted that the plan had been prepared after the project was completed and that he had not visited the site prior to preparing the plan, but instead had relied on general information that was available on the Internet. Larson also stated that he was not aware that the project had already been completed when he had signed the plans.⁴⁵

39. Although Inspector Hoffman was concerned about these facts, he reasonably assumed that the "public road" standard had been followed for the project because the plan said "lightweight fill," it indicated that fabric would be used, and referenced that the project would comply with MnDOT "specs."⁴⁶

40. Inspector Hoffman, who is not an engineer, reasonably assumed that the tire shreds had been used to "float the roads" over boggy wet soils.⁴⁷ At that time, MPCA Engineer Vleck assumed the same, based on the presence of wetland areas nearby, as shown in Internet information.⁴⁸

41. MPCA continued to receive complaints about the site, including allegations that fabric had not been used to incorporate the waste tire shred fill as required by the MnDOT specification.⁴⁹

42. As a result of these calls, Inspector Hoffman arranged a meeting to discuss the site with local officials and citizens. Inspector Hoffman and Engineer Vleck attended this meeting on August 26, 2010. Both MPCA officials visited the site before the meeting. Inspector Hoffman took some pictures, but not much had changed since his last visit. At that meeting, Inspector Hoffman heard citizens report that fabric had not been used and that the excavated areas were deeper than indicated on the plans. This raised more concerns about the project within the MPCA.⁵⁰

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Test. of C. Hoffman and R. Larson.

⁴⁶ Test. of C. Hoffman.

⁴⁷ *Id.*

⁴⁸ Test. of Daniel Vleck,

⁴⁹ Test. of C. Hoffman, V. Fore, Darrel McIalwain, Dennis McNally, and Ronald Peterson.

⁵⁰ Test. of C. Hoffman, D. Vleck; Ex. 19.

43. After the meeting, Inspector Hoffman requested pictures from Brandon McGaw, a DNR Conservation Officer who had observed and photographed the Harbor Road driveway when it was under construction.⁵¹

44. Officer McGaw observed the site on June 23, 2010. He pulled off Harbor Road/CR 12 to see the site because he observed large mounds of dirt near the 153rd Avenue entrance and thought that they might be filling in a wetland. He did not find a wetland. However, he was surprised by the size of the excavation and by the fact that it was filled with pieces of waste tires, so he took pictures of what he believed might be illegal solid waste disposal. The excavation was filled with waste tire shreds when he observed it. Officer McGaw's pictures confirmed that fabric was not used.⁵²

45. Although the post-excavation plans prepared after the project was completed indicated that the excavation was or would be 10 feet deep, in actuality the depth of the excavation that was filled with FSTD tire shreds was no less than 12 feet and as much as 20 feet deep.⁵³

46. After receiving the McGaw pictures and meeting with MPCA enforcement staff in an "enforcement forum," Inspector Hoffman sent an alleged violation letter (AVL) to Minnikka seeking information about the project.⁵⁴

47. On September 27, 2010, Minnikka responded to the AVL. In its response, Minnikka admitted not following the plans with regard to fabric encapsulation of the tire material, but argued that it had used "heavy soils" for encapsulation. Minnikka did not argue that the use of the unencapsulated waste tire material was a one-to-one substitute for conventional aggregate.⁵⁵

48. Based on the September 27, 2010 response letter, Inspector Hoffman concluded that Minnikka had not followed the standard for beneficial use for roads because Minnikka had not used fabric, which is required.⁵⁶

49. After receiving the September 27, 2010 response, Inspector Hoffman met with additional MPCA staff in an enforcement forum meeting. The MPCA decided to allow Minnikka an opportunity to submit a case-specific beneficial use application based on information supporting the use of the waste tires on the property. On December 22, 2010, the MPCA issued a proposed administrative order requiring Minnikka to develop information necessary to support a case-specific beneficial use determination.⁵⁷

⁵¹ Test. of C. Hoffman, Brandon McGaw.

⁵² Test. of B. McGaw; Ex. 21.

⁵³ Test. of V. Fore, D. McIlwain, and D. McNally.

⁵⁴ Ex. 12.

⁵⁵ Ex. 13.

⁵⁶ Test. of C. Hoffman.

⁵⁷ Hoffman Testimony; Ex. 56.

50. Initially, Mr. Niemi cooperated with the MPCA and met with Inspector Hoffman and Engineer Vleck to discuss the information that would be needed. However, after an initial meeting with a consultant that FSTD hired to obtain the information, Niemi declined to submit the information that was requested and instead attempted to justify the project based on historical information about other projects that he believed were similar and that had been completed prior to the 2004 MPCA regulations on allowable beneficial uses of TDP.⁵⁸

51. At some point after the December 22, 2010, order was issued, Minnikka began to argue that the tire material was a “substitute for conventional aggregate” project and had been used to prevent frost heaving on the site resulting from soils prone to frost heaving.⁵⁹

52. Because Minnikka did not submit a case-specific beneficial use determination, MPCA issued a different proposed administrative order. This order required Minnikka to remove the waste tire material from the property.⁶⁰

53. Based on its annual report, the Minnikka project was the second biggest use of waste tire shreds generated by FSTD in 2010. According to the 2010 annual report filed by FSTD, 192 “loads” of waste tires had been delivered to the site.⁶¹ Some additional loads of tire-derived material were delivered to the site in November 2010. These loads were placed in a large area near the buildings on the site, as photographed by Ronald Peterson.⁶² This area does not appear on the July 28, 2010, site plans prepared by Richard Larson.⁶³

54. Inspector Hoffman has inspected other driveway projects in Kanabec County where tire shreds from FSTD were used as part of a driveway project. On the Bowerman project, two to three feet of waste tire material was used to support the driveway and fabric may have been used on the top. Inspector Hoffman concluded that the use of waste tire material was not an excessive use of waste tires, and focused instead on other solid waste issues that were problems on the property.⁶⁴

55. Mr. Daniel Vleck, who is a senior engineer at the MPCA, became aware of the Minnikka project in July 2010, after Inspectors Hoffman and Lisa Mojsiej mentioned that the MPCA had received complaints. He was familiar with FSTD because he had worked on the permit for the Isanti facility. Inspector Hoffman asked engineer Vleck to review the plans provided by Mr. Niemi during his site visit on July 29, 2010.⁶⁵

⁵⁸ *Id.*

⁵⁹ *Id.*; Test. of D. Vleck.

⁶⁰ Ex. 23.

⁶¹ Ex. 20.

⁶² Ex. 22; Test. of Ronald Peterson.

⁶³ Ex. 18.

⁶⁴ Test. of C. Hoffman; Ex. 41.

⁶⁵ Test. of D. Vleck.

56. The plan Engineer Vleck reviewed had been prepared by Richard Larson the weekend prior to the July 29, 2010 meeting. Mr. Larson is a retired, certified professional engineer (PE) who works for FSTD as a consultant. He is paid by FSTD on an hourly basis and his assigned duties are the promotion of the use of FSTD's tire-derived products to potential customers of FSTD.⁶⁶ The plan included a typical half-section of an 18-foot road (9 feet of driving surface and 13 feet of shoulder) and showed 10 feet of "light weight tire fill" being used. The plan also included the following language, "the unique part of this project is the use of a fabric to provide full depth frost protection stability for the driveway – (trial site)." The plan sheets also noted "all work to be to state DOT standards" and "the governing specification is the 2005 edition of the MN Dept. of Transportation standard specifications for construction shall govern (*sic*) as modified by the state." The plan also noted "soil factor poor clay unknown."⁶⁷

57. Mr. Vleck is also a certified Professional Engineer. When he views plans prepared by another PE, he typically considers those plans to be reliable. Engineer Vleck's first impression of the Larson plans was that the use of tire shreds was for a lightweight fill road under standing beneficial use 7035.2860, subp. 4, G. "Lightweight fill" is used to "float" a road over weak and compressible soils. He assumed that fabric encapsulation had been used because it was specified on the plans. The MnDOT standard for use of waste tire in road construction requires fabric to be used. Vleck assumed that the soils were weak because he could see a wetland area not far from the site using on-line soils information and assumed that mucky organic soils were under the site.⁶⁸

58. Although state law does not require the MnDOT standard to be followed for private roads, MPCA will accept lightweight fill tire product use in *any* road that adheres to the MnDOT standard to be a beneficial use. The MPCA expects that persons who do not wish to follow the MnDOT standard for a road will seek a case-specific approval.⁶⁹

59. Engineer Vleck's impression of the soils at the Minnikka location changed in August 2010, when he and Inspector Hoffman stopped at the site on their way to a meeting of concerned citizens and local government staff. Engineer Vleck observed that the soils looked gravelly with some finer material, but with a lot of sand. This type of material is not "weak" or "organic" such that a road would need to be "floated" over the area. At the meeting, Vleck learned that fabric had not been used.⁷⁰

60. To support the staff team, engineer Vleck researched the potential uses of tire product for this type of site. Frost heave was not the first justification offered by Minnikka with regard to its use of tire product on the Minnikka site. However, at some point after MPCA staff first met with Minnikka about the site, Minnikka began to argue

⁶⁶ Test. of Richard Larson.

⁶⁷ Ex. 18.

⁶⁸ Test. of D. Vleck.

⁶⁹ Test. of Paula Connell, PE and MPCA Supervisor of the Solid Waste Permitting Unit.

⁷⁰ Test. of D. Vleck.

that its alleged 10 feet of waste tire shreds had been used because the soils on the site were subject to frost heave.⁷¹

Frost Heave

61. Frost heave is a problem with water being drawn by capillary action from a continuous source – usually groundwater – to a frost front below a road where it continues to expand as more water freezes. There are three ingredients necessary to frost heave: susceptible soils, cold, and a continuous source of water. It is not a problem if roads move uniformly up and down. Frost heave is only a problem if there is differential.⁷² There are a number of methods available to reduce frost heave on a road. One method is to remove problematic soils by making a “subcut” and replacing those soils with different material.⁷³

62. A layer of waste tire shreds functions in two ways to prevent frost heave. First, the tire shreds insulate the soils below them preventing the freezing zone from penetrating to the saturated soils. Second, they serve as a barrier to disrupt the capillary action bringing the water to the frost front. As a result, a thick layer of waste tire shreds is not necessary to provide protection against frost heave issues. One to two feet of shreds will serve to achieve frost protection.⁷⁴

63. Dr. Dana Humphrey of the University of Maine is the principal scientific researcher with regard to waste tire material.⁷⁵ MnDOT has also studied waste tire material and published its research findings.⁷⁶

64. The American Society for Testing Materials (ASTM) has adopted a standard addressing various engineering applications for waste tire derived materials. The latest version of this standard was adopted in 2008 and is titled Standard Practice for use of Scrap Tires in Civil Engineering Applications.⁷⁷ ASTM is an international standard used by engineers to inform their work. The ASTM is not like a fire code or electrical standard that is intended to be adopted as a uniform code by states.⁷⁸

65. The ASTM document incorporates information derived from Dr. Humphrey’s studies. The ASTM document stated that the “thermal relativity of TDP is approximately eight times greater than for typical granular soil. For this reason, TDP can be used as a 150 to 450 mm thick insulating layer to limit the depth of frost

⁷¹ Test. of D. Vleck.

⁷² Test. of D. Vleck and Blake Nelson, PE in the MnDOT Geotechnical section.

⁷³ *Id.*; See also, e.g., Ex. 35 at 3-2.0(20), Ex. 36.

⁷⁴ Test. of D. Vleck and B. Nelson.

⁷⁵ Exs. 25 - 27, 29, and 31.

⁷⁶ Exs. 24, 28, and 39.

⁷⁷ Ex. 36.

⁷⁸ Test. of D. Vleck.

penetration beneath roads.”⁷⁹ ASTM also suggests that waste tires should be separated from mineral soils by the use of a fabric encapsulation layer.⁸⁰

66. In 2003, MnDOT published a document that noted the same insulating factors as ASTM and noted that tire shreds can be used in an insulating layer 6 inches to 18 inches thick.⁸¹

67. The MPCA is familiar with the scientific studies of both Humphrey and MnDOT, as well as the ASTM standards.⁸²

No Frost Heave at Minnikka’s Harbor Road Site

68. Based on the scientific research for appropriate uses of scrap tires in civil engineering applications, Engineer Vleck concluded that less than two feet of tire shreds would provide frost protection on any site. Minnikka’s placement of 10+ feet of waste tire shreds in the ground was not a beneficial use for that site, and that the excess use of the material constituted impermissible disposal.⁸³

69. Northern Technologies, Inc., (NTI) made two soil borings on the Minnikka property in April 2012, at the request of FSTD. However, information from the soil borings does not establish that the soils on the site were subject to frost heave. NTI did not locate either a perched or continuous water source, which is a necessary ingredient for frost heave. Although some of the soil types identified in the boring can have a potential to create frost heave, not enough information was provided by NTI about particle size (in particular, the percent of silt) or moisture content to allow a conclusion to be drawn.⁸⁴

70. A blow count measures the density of ground soils. It is performed by determining how many blows it takes from a certain heavy anvil or slide hammer dropped 30 inches onto a metal tube to penetrate six inches of ground. The blows for first six inches are usually discarded. The next count of the blows constitutes the blow count for the next foot. Bad soils, those requiring replacement with substitute aggregate that will support roads and prevent frost heave, are the organic soils, clays, and peat that are scattered throughout Minnesota. Blow counts for those soils will be one or zero. Zero means that the hammer is set on top of the tube and it just sinks into the ground without being struck.⁸⁵

71. Boring number two at the Minnikka site produced a blow count of six for both the first two feet and the next two feet. This indicates decent soil density and such

⁷⁹ Ex. 36, section 6.2.

⁸⁰ Ex. 36, sections 6.9 & 6.11.4.

⁸¹ Ex. 39 at 83.

⁸² Test. of D. Vleck.

⁸³ *Id.*

⁸⁴ *Id.*; Ex. 72.

⁸⁵ Test. of B. Nelson.

soil is appropriate for bridges and retaining walls. The blow count increased to 11 for next two feet and 19 for next two feet. A blow count of 19 is very dense and stiff soil.⁸⁶

72. Making a subcut is an expensive process. The MnDOT general rule is that it costs \$4 per cubic yard. As a result, road builders typically just do what is actually necessary for a subcut. The pavement manual includes a method to calculate the frost line for a particular site using data about the site or using a “rule of thumb” and replace problematic soils to 1/2 the maximum predicted frost depth for that area. Exhibit 35 provides the calculation method. Nelson used this calculation method and could not get a frost line greater than 54 inches, even using highly favorable values for production of frost on the Minnikka site.⁸⁷

73. Only the upper portion of the waste tire material on the Harbor Road site could possibly be a beneficial use for frost protection, to a maximum of four feet. No MnDOT road project anywhere in the state of Minnesota (or elsewhere) has a subcut of 8 or 10 feet for frost protection. Even on interstate highways, the absolute maximum subcut is four feet.⁸⁸

74. From all information available, in particular the “blow counts” from the soil borings, Engineer Nelson concluded that there was no lightweight fill use required for Minnikka’s Harbor Road site.⁸⁹

75. In the report, “Effective Methods To Repair Frost Damaged Roadways,” which was authored, in part, by Charles D. Hubbard, a principal of Braun Intertec Corporation, the following was noted with regard to the depth to be excavated during removal and replacement situations:

Excavations on the order of 12 inches may be adequate where the underlying, exposed materials are relatively stable and the replacement backfill can be adequately compacted. Excavations on the order of 24 to 36 inches are more typical where the exposed materials are unstable, organic, or debris-laden.⁹⁰

76. Minnikka’s Harbor Road property has not been and is not subject to frost heave.⁹¹

77. No road project within the last 25 years in the state of Minnesota, including interstate highways that carry 200,000 vehicles per day and their interchanges, have gone 8 or 10 feet down for frost protection. Subcuts on such roads go down four feet from the surface at the absolute maximum.⁹²

⁸⁶ *Id.*

⁸⁷ Test. of B. Nelson; Ex. 35.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Ex. 44.

⁹¹ *Id.*; Test of D. McIlwain, D. McNally, V. Fore.

⁹² Test. of B. Nelson; Ex. 72.

CONCLUSIONS

Jurisdiction

1. The Administrative Law Judge and the Commissioner of the MPCA have jurisdiction of this proceeding pursuant to Minn. Stat. §§ 14.57 – 14.62 and Minn. Stat. § 116.072.

2. The Notice of Hearing in this matter was proper, and all relevant substantive and procedural requirements of law or rule have been fulfilled. The matter is therefore properly before the Administrative Law Judge and the Commissioner.

Burden of Proof

3. The MPCA has the burden to establish by a preponderance of the evidence that Minnikka violated applicable laws or rules, and that issuance of the Administrative Penalty Order (APO) was warranted. If the MPCA establishes the alleged violations, the ALJ may not recommend a penalty different in amount than that contained in the APO unless the amount of the proposed penalty is determined to be unreasonable, after considering the factors set forth in Minn. Stat. § 116.072, subd. 2(b).

Disposal of Solid Waste in Minnesota

4. The Minnesota State Legislature has established goals for the MPCA with regard to solid waste management. These goals include the goal of reducing the land disposal of waste by finding ways to separate and recover materials and energy from waste. Waste reduction and re-use is the management method that is preferred.⁹³

5. In general, a permit is required to dispose of solid waste. The MPCA permits a number of different kinds of solid waste land disposal facilities, depending on the nature of the waste.⁹⁴

6. Minn. Stat. § 115A.904 prohibits the disposal of waste tires on land in Minnesota and provides as follows:

The disposal of waste tires in the land is prohibited after July 1, 1985. This does not prohibit the storage of unprocessed waste tires at a collection or processing facility.

7. There are exceptions to the rule that a permit must be obtained to dispose of waste. One exception is for a “permit-by-rule” or “PBR” disposal facility. This type of facility is limited as to the type and amount of waste it can accept, and can only operate

⁹³ Minn. Stat. § 115A.02.

⁹⁴ Minn. R. 7001.3050.

for a limited time. A person who operates a PBR disposal facility must give notice to the MPCA and to future landowners by filing a deed notice specifying the type and location of the waste.⁹⁵

MPCA's 2004 Beneficial Use Rules for Solid Waste

8. The other exception to the requirement to get a permit is where a person or entity is using waste pursuant to the MPCA's "beneficial use" rule under Minn. R. 7035.2860.

9. The MPCA adopted the beneficial use rule in 2004.⁹⁶ The purpose of the beneficial use rule was to standardize the MPCA's approach to allowing use of waste so as to encourage the beneficial use of wastes.⁹⁷

10. Minn. R. 7035.2860, the beneficial use rule, establishes the standard for what a beneficial use of solid waste is and provides as follows:

Subp. 2. Beneficial use standards. To constitute a beneficial use under this part, the following standards must be met:

A. the solid waste must not be stored in anticipation of speculative future markets;

B. the solid waste must be adequately characterized in accordance with part 7035.2861;

C. the solid waste must be an effective substitute for an analogous material or a necessary ingredient in a new product;

D. the use of the solid waste does not adversely impact human health or the environment; and

E. the solid waste must not be used in quantities that exceed accepted engineering or commercial standards. Excess use of solid waste is not authorized by this part and is considered disposal. (Emphasis added.)

11. In the Statement of Need and Reasonableness (SONAR) supporting the rule, the MPCA stated that Item E was added for the following reason:

The beneficial use rule pre-approves certain uses as 'standing' beneficial uses. For a standing beneficial use, the user is not required to notify the MPCA or future users of the property. Minn. R. 7035.2860, subp. 4.

⁹⁵ Minn. R. 7001.3050, subp. 3, B.

⁹⁶ 28 SR 1084, March 2004.

⁹⁷ Test. of P. Connell.

This item is related to ensuring that a use project does not become a cover for disposal of solid waste. It is reasonable to limit the quantities of waste to those actually necessary for any given project to prevent disposal under the guise of use. Raw materials are generally not used in excess because there is a cost associated with using more of the material and there is no sensible reason for using more of a raw material than is actually needed. There are situations, however, where incentives exist to use more of a solid waste than is actually necessary to avoid disposal costs. As stated previously, the MPCA may approve alternative disposal, but not under the exception created by this rule part.⁹⁸

12. If a standard beneficial use does not exist, the MPCA allows users to apply for a “case-specific” beneficial use determination by submitting information about their proposed use.⁹⁹ If there is not enough information known about the potential use, the proposer can also apply to undertake the project as a “demonstration project.”¹⁰⁰ The MPCA approves 20 to 30 case-specific beneficial uses each year and “a few” demonstration projects each year.¹⁰¹

13. There are three standing beneficial uses that apply to waste tire-derived products. Minn. R. 7035.2860, subp. 4, F, allows the use of “[c]rumb rubber when used in asphalt paving or applications where it is used as a substitute for rubber or similar elastic material.” Minn. R. 7035.2860, subp. 4, G, allows the use of “[t]ire shreds when used as lightweight fill in the construction of public roads in accordance with Minnesota Statutes, section 115A.912, subdivision 4.” Finally, Minn. R. 7035.2860, subp. 4, H, allows the use of “[t]ire chips when used as a substitute for conventional aggregate in construction applications when the ratio of this substitution is no greater than one-to-one by volume. This does not include use of tire chips as general construction fill or clean fill.”

14. Tire shreds and tire chips are not defined terms under the rule, although the Statement of Need and Reasonableness indicates that tire chips are generally smaller than 12 inches in size.¹⁰²

15. Minn. Stat. § 115A.912, subd. 4 provides:

Waste tire materials; prohibition. Materials derived from waste tires may not be used as lightweight fill in the construction of public roads in the state unless the construction plan is prepared by a professional engineer experienced in the geotechnical field and licensed in the state of Minnesota. The plan shall include, but not be limited to, the location, duration, and length of the project, the depth of fill, the depth of cover, the

⁹⁸ Ex. 1 at 29.

⁹⁹ Minn. R. 7035.2860, subp. 5.

¹⁰⁰ Minn. R. 7035.0450.

¹⁰¹ Test. of L. Mojsiej.

¹⁰² Ex. 1 at 31.

size of waste tire pieces, the plan for encapsulating the waste tire pieces, and the fire protection plan. All engineering specifications must be consistent with the current lightweight tire fill engineering practices as developed for roadways by the Minnesota Department of Transportation.

16. Because Mr. Niemi was involved in the development of the Statement of Need and Reasonableness for the foregoing beneficial use rules, he knew or had reason to know both what is contained in the SONAR and the beneficial use rules themselves.

17. The Minnesota Department of Transportation (“MnDOT”) has adopted a specification applicable to the use of materials derived from waste tires.¹⁰³

18. Although the MnDOT standard does not specifically apply to private roads, the MPCA interprets the rule to allow the use of tire shreds for private roads so long as the MnDOT standard is met. If the MnDOT standard is not met, the MPCA requires a “case-specific beneficial use” or the use must be consistent with Minn. R. 7035.2860, subp. 4, H, which allows tire chips to be used as a one-to-one substitution for conventional aggregate, but not as construction fill or clean fill.

The Scope of Minnikka’s Use of Tire Shreds Under the Driveways on Its Harbor Road Site is Disposal, Not Beneficial Use

19. No relevant and reliable evidence in the record supports the use of 120 inches (10 feet) of tire-derived material to replace excavated soils in order to address potential frost heave.

20. MPCA has proved by a preponderance of the evidence that Minnikka violated Minn. Stat. § 115A.904, Minn. R. 7035.2860, subps. 1, 2 and 4, by utilizing waste tire shreds on its property located at Harbor Road and 153rd Avenue, Kanabec County, Minnesota, in quantities that exceed accepted engineering standards, and failing to seek and receive a case-specific beneficial use determination by the MPCA.

21. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

22. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

23. These Conclusions are made for the reasons set out in the attached Memorandum, which is incorporated by reference in these Conclusions.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

¹⁰³ Ex. 40

RECOMMENDATION

IT IS HEREBY RECOMMENDED:

That the November 29, 2011 draft Administrative Penalty Order of the MPCA be **AFFIRMED** and **IMPLEMENTED** by the Commissioner.

Dated: August 1, 2012

/s/ M. Kevin Snell

M. KEVIN SNELL
Administrative Law Judge

Reported: Digitally Recorded

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Minnesota Pollution Control Agency will issue a final decision after reviewing the administrative record, and he may adopt, reject or modify the Administrative Law Judge's Findings of Fact, Conclusions, and Recommendations. The parties have five days after receiving this recommended decision in which to file any exceptions to the report with the Commissioner.¹⁰⁴ Parties should contact the office of John Linc Stine, Commissioner, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155, 651-296-6300, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the entire record closes.

Under Minnesota law, the Commissioner is required to serve his final decision upon each party and the Administrative Law Judge by first-class mail.

¹⁰⁴ Minn. Stat. §§ 14.61 and 116.072, subd 6 (e).

MEMORANDUM

Burden of Proof

The burden of proof is on the MPCA to show by a preponderance of the evidence that Minnikka violated Minn. R. 7035.2860, and that the remedy required under the APO is reasonable.¹⁰⁵ MPCA has met the burden of proof and established by a preponderance of the evidence that Minnikka violated Minn. Stat. § 115A.904 and Minn. R. 7035.2860, subps. 1, 2 and 4, by utilizing waste tire shreds on its property located at Harbor Road and 153rd Avenue, Kanabec County, Minnesota, in quantities that exceed accepted engineering standards, and by failing to seek and receive a case-specific beneficial use determination by the MPCA.¹⁰⁶

Analysis of the Relevant Facts and Applicable Law

Mr. McIalwain, who worked for 50 years in road construction, testified that he was familiar with the soils on the site because he owns the land across the road from the Minnikka Harbor Road site. Mr. McIalwain had dug post-holes and confirmed that the soils were gravelly, rocky and “perfect road material.” Mr. Dennis McNally also testified that the soils on the Minnikka property were rocky and gravelly based because over the years he had dug holes (prior to Minnikka’s purchase of the property) for the purpose of building and utilizing coyote traps. Victoria Fore testified that she constructed a driveway without a subcut on her land in 2009. Her land is directly adjacent to the Minnikka property and was originally part of the same 40-acre parcel. Her driveway has not suffered any frost issues. None of the three citizens who testified were aware of problems with soils in the Minnikka property or vicinity that required special construction as a result of frost heave.

Although the plans prepared for the project indicated that the excavation would be 10 feet deep, the local citizens who observed the excavation testified at the hearing that it appeared that the excavation was deeper than 10 feet. Ms. Fore testified that the excavation ran from Harbor Road up to the buildings and that two entire semi-trailer trucks could have been parked in the bottom and covered up with dirt without anyone knowing that they were there. She observed the depth of the excavation while standing on its North edge and testified that, should she have fallen in, she would not have been able to get out. Ms. Fore also testified that the ceilings in her assisted living facility are nine feet in height and that the depth of the driveway excavation was at least twice the height of the ceilings in her facility because three men could have stood on each other’s shoulders and not reached the top. Ms. Fore’s testimony was entirely credible, as it was given candidly, without hesitation or any indications of animosity or guile. The startling depth of the excavation concerned her because of the risk of harm it presented to her residents. Darrel McIalwain, who worked for 50 years in the construction business, testified that he saw a large 225 CAT backhoe on tracks down in the excavation, and there would have been no reason to have the CAT in the trench except

¹⁰⁵ Conclusion 6.

¹⁰⁶ Findings 15 and 16.

if you were going deeper than 8 to 10 feet because the machine is capable of digging that deep from the surface. Dennis McNally, who also worked on construction sites, observed the trench on a number of occasions and testified that the trench was 12-15 feet deep. McNally and McLalwain testified that they saw around 200 to 250 semi-loads of tire shreds delivered to this site.

Accepted Engineering Standards for Use of Scrap Tire Material in Construction of Roads

The ALJ found that the testimony of the MPCA's witnesses was credible in all material respects. The highly qualified experts called by the MPCA each testified to a reasonable degree of scientific certainty with regard to their professional examinations and opinions. They were credible and knowledgeable witnesses.

Blake Nelson, who has worked for MnDOT for 24 years as a geotechnologies engineer specializing in soils requiring special management, concluded that the soils on the Minnikka site were "pretty good from what we typically see." Nelson testified that MnDOT supports a lot of sensitive infrastructure on soils like this.

It is MPCA Engineer Vleck's opinion that Minnikka's placement of 10+ feet of waste tire shreds in the ground was not a beneficial use for that site, and that the excess use of the material constituted impermissible disposal. No relevant and reliable evidence in the record supports the use of 120 inches (10 feet) of tire-derived material to replace excavated soils in order to address potential frost heave.

The amount of tire shreds used by Minnikka in its Harbor Road driveways exceeds the requirements of such use in constructing interstate highways. Minnikka's use was unnecessary, unreasonable and without justification under the application of scientific engineering principles and the actual soil conditions on the site.

Discussion of Minnikka's Argument and Evidence

Minnikka argues that projects FSTD and Mr. Niemi completed prior to the effective date of the rules, with MPCA's consent, are relevant to this proceeding. They are not. When a law or rule changes, what may have been permissible and legal before the change is no longer permissible after the change. Mr. Niemi's "napkin" projects between 1986 and March 2004 are irrelevant to this proceeding.

Rather incredibly, Minnikka argues that the purpose of the beneficial use rules was to encourage use of waste tires and "not regulate" use. Minnikka's reading of the SONAR document is selective and ignores the specific purposes and limits contained in the document. Those purposes translated into the beneficial use rules, their requirements, and their limitations.

Mr. Richard Larson is a certified professional engineer who has a contract with FTSD to help market its tire-derived material. Before his retirement, Mr. Larson had worked in a professional capacity for a number of public entities, including MnDOT, and

he was the Mille Lacs County Engineer for many years with responsibility for 400 miles of roads. Mr. Larson testified that he designed Minnikka's Harbor Road project to meet his client's needs, in particular to make a "show case" project where people could see how waste tire product worked in a design for protection against frost heave. For that reason, the project had to be a "fail safe" project. Larson did not see any need to have soil information or groundwater information prior to designing the project and "Google Earth" contours were adequate for a driveway.

At the hearing Mr. Larson claimed that he did not mean to imply that the project was a "lightweight fill" project when he used the words "light weight tire fill" in his written plan. He also claimed that the plan language regarding the use of fabric for frost protection was a cut and paste error and he meant to say "waste tire chips" not "fabric." He further claimed that his reference to MnDOT standards meant the standard book or "green bible" and not other MnDOT standards such as the one pertaining to the use of waste tire material in roads.¹⁰⁷ Finally, Larson testified that his experience was the basis of his recommendation, and he that "did not care" what MnDOT or ASTM might have recommended. Mr. Larson could not explain how Mr. Niemi caused the project to be constructed in accordance with his plans when his plans were not available until after the driveways had been built. Mr. Larson's testimony was not credible or scientifically based. He was not offered as an expert for this proceeding and the ALJ gives no weight to his attempts to justify the Minnikka project after the fact.

Mr. Matthew Oman of Braun Engineering testified concerning a report that summarized various measures of frost penetration in Minnesota.¹⁰⁸ This report showed that the figure used by Mr. Larson for frost penetration was the most conservative figure based on the oldest data that could have been used. Other more updated sources of information on frost penetration suggest that frost penetration in the general area of Isanti would likely be less than 90 inches. Because of the failure of NTI to perform laboratory analysis on the soils in the borings, the Braun report also stated that Braun "can not make a recommendation regarding the specific rate or magnitude of frost heave of the silty sand soils without review of the soils and laboratory test results (hydrometer analysis required to establish the percentage finer than 0.02 mm.)." The report also stated that "we typically do not recommend subcutting materials to this depth because our clients are usually willing to accept the risk of frost heave and reduce their construction expenses by performing a smaller subcut." The Braun Engineering report and witness provided no support for Minnikka's positions. Their evidence was actually supportive of the position of MPCA.

NTI's representative Anthony Francis admitted on cross-examination that its reports did not usually include information about subcuts from the Minnesota Paving Manual, and that he had only added that language to the report at the request of Richard Larson. NTI also did not provide field notes or chain-of-custody information that would make the information in the report reliable from an evidentiary standpoint. The ALJ considered this evidence, but gave it little weight due to its lack of reliability.

¹⁰⁷ Ex. 40.

¹⁰⁸ Ex. 80.

Mr. Joseph Otte, an employee of Wenck Engineering and former MPCA employee, testified as a fact witness for Minnikka. FSTD and Mr. Niemi are his clients. Mr. Otte testified that, prior to 2004 and the adoption of the beneficial use rules, MPCA staff had taken varying positions with regard to what was allowed for beneficial use projects involving waste tires. However, Mr. Otte was generally unfamiliar with the requirements of the current beneficial use rules, specifically the option under the beneficial use rule to obtain a “case-specific beneficial use determination” under Minn. R. 7035.0860, subp. 5, or the option to perform a “demonstration project” under Minn. R. 7035.0405. The applicable law in this matter is the application of the beneficial use rules that have been in effect since 2004 and were in effect in 2010. Neither Mr. Otte’s testimony nor Mr. Niemi’s reliance on what he did on projects prior to adoption of the beneficial use rules in 2004 are relevant. Those factors were not considered by the ALJ in applying the relevant facts to the applicable law in this matter.

Conclusion and Appropriateness of Remedy for the Violations

The first step in road construction is the taking of soil borings to determine the quality of the soil and attempt to locate the water table, if any. However, in this case Minnikka had the soil borings done long after the driveway project had been completed. The evidence in the record suggests that Minnikka was not actually seeking to meet a need to replace poor soils, but was seeking to dispose of excess waste tire shreds and attempt to justify that disposal after the fact.

It would be improper and unreasonable to allow the waste tire shreds to remain at the Harbor Road site for an unsuspecting future owner to discover and need to remove them. The decision of MPCA to impose a fine and require removal of the excess waste tire shreds was reasonable and appropriate for the violations of the solid waste law and MPCA rules.

Based on the relevant and reliable evidence presented, the Administrative Law Judge recommends to the Commissioner that the APO be upheld and implemented.

M. K. S.